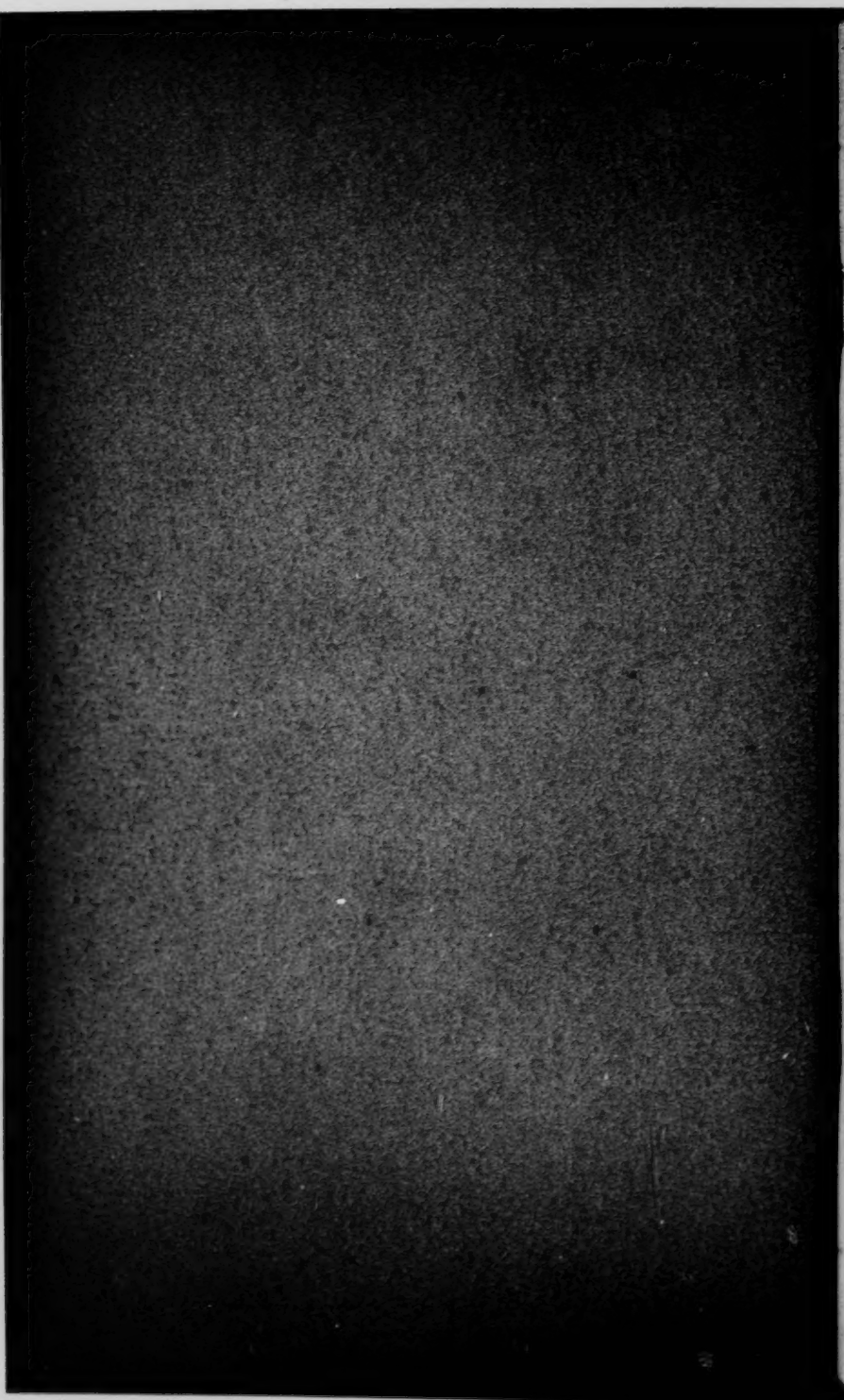

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1660

STANLEY BLACKLEDGE, WARDEN,
CENTRAL PRISON, RALEIGH, N.C.
AND STATE OF NORTH CAROLINA,

Petitioners,

v.

JIMMY SETH PERRY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the indictment and conviction of respondent at a de novo trial of a more aggravated form of assault than that which he was convicted of in an inferior Court violates the double jeopardy guarantees of the Fifth Amendment as made binding on the states by the Fourteenth Amendment.

2. Whether the enhancement of an assault charge from a misdemeanor to a felony at a de novo trial and the restriction of the right to a trial by jury denied respondent due process of law.

3. Whether respondent invariably forfeits or waives claims of double jeopardy and denial of due process of law by a plea of guilty.

4. Whether *Boykin v. Alabama*, 395 U.S. 238 (1969), requires a full statement to a defendant of the rights waived or forfeited by the plea of guilty, and if so, what is the effect of the failure to caution respondent that his plea of guilty could constitute waiver or forfeiture of claims of double jeopardy and denial of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V

"No person shall be . . . subject for the same offense to be put twice in jeopardy of life or limb. . . ."

U.S. Constitution, Amendment VI

"In all prosecutions, the accused shall enjoy the right to . . . a trial by an impartial jury. . . ."

U.S. Constitution, Amendment XIV

"No State . . . shall . . . deprive any person of life, liberty or property, without due process of law."

North Carolina G.S. 7A-272

". . . [T]he district court has exclusive, orginal jurisdiction for the trial of criminal actions . . . below the grade of felony, and the same are hereby declared to be petty misdemeanors."

North Carolina G.S. 7A-196(b)

"In criminal cases there shall be no jury trials in the district court. Upon appeal to Superior Court trial shall be de novo, with jury trial as provided by law."

North Carolina G.S. 7A-290

"Any defendant convicted in district court may appeal to the Superior Court for trial de novo. . . ."

North Carolina G.S. 15-177.1

"In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon."

North Carolina G.S. 14-32(a) (1969)

"Any person who assaults another person with a firearm or other deadly weapon of any kind with intent to kill and inflicts serious injury is guilty of a felony punishable under G.S. 14-2."

North Carolina G.S. 14-2

"Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court."

North Carolina G.S. 14-33 (1969)

(b) ". . . A person commits an aggravated assault . . . if in the course of such assault . . . he:

(1) Uses a deadly weapon. . . ."

(c) ". . . Any . . . aggravated assault . . . is punishable by a fine in the discretion of the court,

imprisonment not to exceed two (2) years, or both such fine and imprisonment."

STATEMENT OF THE CASE

Jimmy Seth Perry was convicted in August, 1968 in the Wilson County Superior Court of numerous counts of uttering a forged instrument and obtaining property by false pretense. He received an active prison sentence of 5 to 7 years from which he appealed. On appeal the conviction was affirmed by the North Carolina Court of Appeals. *State v. Perry*, 3 N.C. App. 356, 164 S.E.2d 629 (1968).

While in confinement Perry was involved in an altercation that led to the issuance of a warrant originally charging misdemeanor assault. On August 20, 1969, he was brought to trial in the District Court of Northhampton County. The minutes of the proceedings on that date show that the prosecutor moved to amend the warrant to charge felonious assault and that the motion was allowed. However, the warrant was amended again to charge misdemeanor assault to which Perry entered a plea of not guilty and following trial before the Court without a jury was convicted and given a six month sentence.[1] The sentence imposed, being consecutive with the sentence under service, respondent appealed his conviction to the Northhampton County Superior Court where, in accordance with North Carolina law, his earlier conviction and sentence were nullified and he was tried de

[1] N.C. Gen. Stat. §7A-272 confers exclusive original jurisdiction in the District Court Division of the General Court of Justice for the trial of misdemeanors.

novo.[2] In the interim prior to his appearance in Superior Court, Perry was indicted by the grand jury for the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury. The indictment covered the same alleged acts for which Perry had been tried and convicted of a misdemeanor in District Court.[3] On October 29, 1969 Perry entered a plea of guilty as charged to the bill of indictment and was sentenced to 5 to 7 years in the State's Prison to be served concurrently with the sentence then being served as a result of the convictions in Wilson County. Under applicable North Carolina law this latter sentence commenced as of October 29, 1969.[4]

Perry filed a *pro se* application for a writ of habeas corpus under 28 U.S.C. §2254 alleging his constitutional rights had been violated. The District Court first dismissed the petition for failure to exhaust available state remedies. However, the Court of Appeals for the Fourth

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[2] N.C. Gen. Stat. §§7A-290, 15-177.1.

[3] Under the assault statutes of North Carolina, the misdemeanor of assault with a deadly weapon is a lesser included offense of the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury. *State v. Weaver*, 264 N.C. 684, 142 S.E.2d 633 (1965); *State v. Burris*, 3 N.C. App. 35, 164 S.E.2d 52 (1968). One can be convicted of the lesser offense on an indictment charging the greater felony offense. *Id.*

[4] Respondent contended successfully in the District Court that he was entitled to full credit for time served in confinement between his arrest on May 28, 1968 on the original charge and the date of certification of the opinion of the Court of Appeals, January 15, 1969. The validity of this holding is unchallenged by the petitioners. Thus, the net effort of the 5 to 7 year sentence for felonious assault was to increase the minimum period of confinement by 17 months and one day, and to increase the sentence received in the District Court by 11 months and one day.

Circuit reversed holding that resort to the Courts of North Carolina would be futile in that the Supreme Court of North Carolina had consistently denied the constitutional claims presented by Perry in his petition.[5]

The District Court on remand found a violation of Perry's rights not to twice be placed in jeopardy for the same offense and further held that this right had not been waived by the plea of guilty in Superior Court. The District Court likewise awarded respondent credit for time spent in custody prior to trial and while awaiting appeal. The Fourth Circuit affirmed.[6]

SUMMARY OF ARGUMENT

The constitutional right of the fifth amendment to not be twice placed in jeopardy for the same offense as made binding on the states by the fourteenth amendment was violated when the State of North Carolina placed Jimmy Seth Perry on trial for felonious assault following an appeal for trial de novo from a conviction in an inferior court of a lesser included offense of misdemeanor assault. The State was free following the appeal to retry Perry for the same offense. The State was not free, however, to retry him on an indictment charging him with a greater degree of the same crime arising out of the same transaction, for his double jeopardy bar to a subsequent prosecution of the felony was unaffected by his appeal

[5] 453 F.2d 856 (4th Cir. 1971). The Court of Appeals further instructed that District Court action await the ruling of this Court in *North Carolina v. Rice*, 434 F.2d 297 (4th Cir. 1970), vacated and remanded, 404 U.S. 244 (1971).

[6] The Fourth Circuit in a three sentence opinion cited only *Ham v. State of North Carolina*, 471 F.2d 406 (4th Cir. 1973) as authority. *Ham* dealt with the issue of credit for pre-trial confinement, an issue no longer pursued in this litigation.

from his conviction for the misdemeanor. The State is bound to bring all of its greater or lesser included charges arising out of one criminal transaction in one prosecution.

The charge of a felony following the giving of notice of appeal for trial de novo likewise violated due process. The State is without power to put a price on appeal. The exercise of that right must be free and unfettered. A prosecutor cannot "punish" a defendant for exercising his right to seek a trial de novo from a misdemeanor conviction by elevating the pending charge to the felony level. If certain conduct mandates criminal charges at the felony level there is no plausible reason why those charged with that determination are unable to make it in the first instance. The conclusion is inescapable that Perry was subjected to felony charges because he sought to exercise his right to appeal for trial de novo.

Also, Perry was denied due process of law in that his right to trial by jury was restricted. Perry was charged with an offense which carried a potential sentence of two years imprisonment, and as such had an absolute right to trial by jury. He was clearly denied that right when forced to submit to trial in District Court without the right to have his guilt or innocence determined by a jury. The fact that he was free thereafter to secure a jury trial by an appeal for trial de novo does not alleviate the constitutional violation. A constitutional right cannot be deferred on a theory that it will be available at a subsequent de novo proceeding. Second, the price attached to the right to trial by jury is the threat of an unexplained harsher charge and sentence which must inevitably unconstitutionally deter the exercise of that right.

Perry did not surrender or waive the right to present his constitutional claims by his plea of guilty to the felony charge at the de novo trial. The claims of double jeopardy and due process presented by this case go to the right of the State to place Perry on trial at all and not to the question of guilt or innocence. A plea of guilty can properly be held to surrender a guilt related constitutional claim; however system related claims are not surrendered by the guilty plea unless the record discloses a deliberate bypass of state remedies and/or a knowing and intelligent waiver of the constitutional claim involved.

Finally, Perry should have been cautioned at the time of his guilty plea precisely what constitutional claims he waived by such a plea. Failure to caution Perry of the effect of his plea should require determination on the merits of the double jeopardy and due process arguments.

ARGUMENT

I.

THE STATE OF NORTH CAROLINA VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, MADE APPLICABLE TO THE STATES IN *BENTON V. MARYLAND*, 395 U.S. 784, BY CONVICTING RESPONDENT PERRY ON TRIAL DE NOVO OF A GREATER DEGREE OF THE OFFENSE OF WHICH HE HAD BEEN PREVIOUSLY CONVICTED IN THE INFERIOR COURT.

> The plea of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was ever given. . . . is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the

> same crime. Hereupon it has been held that *a conviction of manslaughter,* on an appeal, *is a bar even in another appeal,* and *much more in an indictment, of murder;* for the fact prosecuted is the same in both, though the offenses differ in coloring and in degree. (emphasis supplied.) Blackstone, *Commentaries* Book IV, p. 330 (1772 Ed.)

From the time of Blackstone, the common law plea of *autrefois convict* has been held to bar a subsequent prosecution of a *higher* degree of the same offense of which the defendant was previously convicted, as well as to bar a subsequent prosecution for the same *degree* of the offense. The double jeopardy clause of the Fifth Amendment made the prior conviction bar a constitutional guarantee, *Ex parte Lange,* 85 U.S. (18 Wall.) 163 (1873), and the federal courts have consistently held that the rule barring reconviction of the same offense bars a subsequent prosecution for a greater degree of the same crime. *Gavieres v. United States,* 220 U.S. 338 (1911); *Ex parte Nielsen,* 131 U.S. 176 (1889). In *Benton v. Maryland,* 395 U.S. 784 (1969), this Court held the states bound by these constitutional privileges.

The federal test for determining if the higher offense charged in the second indictment is the "same crime" for purposes of the prior convictions bar was originally borrowed from the test enunciated in the 1871 Massachusetts decision of *Morey v. Commonwealth,* 108 Mass. 433 (1871). That test provided that a conviction or acquittal upon one indictment is a bar to a subsequent conviction and sentence upon another if the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The *Morey* test was cited and adopted in the *Nielsen* and *Gavieres* decisions, *supra.* More recently, the

federal standard governing prior convictions for the same crime has been known as the "Blockburger Rule" after *Blockburger v. United States,* 284 U.S. 299 (1932). The "Blockburger Rule" has been recognized as providing that "a prosecution for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater the accused can be convicted of the lesser." *Giles v. United States,* 157 F.2d 588, 590 (9th Cir. 1946).[7]

This standard applies exactly to the varying degrees of the North Carolina assault statutes and requires that conviction of the lesser degree of the offense be a barrier to a subsequent prosecution for the greater degree. Perry was first convicted of the general misdemeanor of assault with a deadly weapon, N.C.G.S. §14-33(b)(1) (1969). Such a conviction, under the federal rules, bars a second conviction under the same statute for the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury, N.C.G.S. §14-32(a) (1969). The sole distinction between the misdemeanor and felony degrees of assault charged is that the latter requires proof of the additional elements of "with intent to kill" and "resulting in serious bodily injury." The misdemeanor is therefore considered "a less degree of the same crime,"

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[7]The common law has long recognized that a person convicted or acquitted of a minor offense cannot be charged again in a more aggravated form—the 'ascending scale principle'. See *Miles* (1890), 24 Q.B.D. 423, 431 (Hawkins, J.).

> Where a criminal charge has been adjudicated upon . . . that adjudication, whether it takes the form of an acquital or conviction, . . . may be pleaded in bar to any subsequent prosecution for the same offense, whether with or without circumstances of aggravation.

See also, Friedland, *Double Jeopardy*, pp. 106-107 (1969).

an included offense of the felony. *State v. Weaver,* 264 N.C. 681, 683, 142 S.E.2d 633, 635 (1965); *see also, State v. Burris,* 3 N.C. App. 35, 164 S.E.2d 52 (1968). Conviction of the higher crime, then, would necessarily include all the elements of the lesser degree, and subsequent prosecution for the higher would be barred by the prior conviction for the included crime.

The rule that a defendant may not be prosecuted again for the crime for which he has been previously convicted is subject, of course, to the well established principle of *United States v. Ball,* 163 U.S. 662 (1896), that a defendant who has been successful in setting aside a prior conviction may be retried for the same offense for which he was formerly convicted. *United States v. Ewell,* 383 U.S. 116 (1966); *United States v. Tateo,* 377 U.S. 463, 465, 473-474 (1964). This principle is often justified by the theory that a defendant who appeals a conviction continues in jeopardy *of that conviction* throughout the appellate process and the new trial. *Green v. United States,* 355 U.S. 184, 193 (1957); *Kepner v. United States,* 195 U.S. 100, 134 (1904) (Holmes, J. dissenting).

Thus the State was free, following Perry's appeal from his conviction of the misdemeanor offense, to retry him on the *same charge* on which he had been previously convicted. The State was not free, however, to retry Perry on an indictment charging him with greater degree of the same crime arising out of the same transactions, for this double jeopardy bar to a subsequent prosecution of the felony was unaffected by his appeal from his conviction for the misdemeanor. This is the teaching of *Green v. United States, supra* and *Price v. Georgia,* 398 U.S. 323 (1970). These cases established the principle that a defendant who appeals from a conviction of a lesser included offense does not yield his double jeopardy

bar to a subsequent prosecution for the greater offense arising out of the same transaction. In *Green* the jury at the first trial was charged that they could find the accused guilty of first degree murder, second degree murder or arson. The jury found Green guilty of arson and of second degree murder. The conviction was reversed on appeal and at the second trial the defendant was found guilty of first degree murder. This Court held that the second prosecution for first degree murder was barred by the double jeopardy clause. "Whatever may be said for the notion of continuing jeopardy with regard to an offense when a defendant has been convicted of *that offense* and has secured reversal of the conviction by appeal," the court wrote, "here Green was not convicted of first degree murder and *that offense was not involved in his appeal.*" 355 U.S. 184, 193. (emphasis supplied). The Court went on to expressly reject the Government's contention that:

> In order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. 355 U.S. at 193.

In *Price*, the Court applied the same standard to a state prosecution to hold that a defendant charged with murder and convicted of the lesser included offense of voluntary manslaughter could not be retried on the murder charge. Upon being convicted of the misdemeanor offense of assault with a deadly weapon Perry acquired a double jeopardy bar to any subsequent prosecution for the same crime, *Ex parte Lange, supra*, or for a greater degree of the same offense arising out of the same transaction. *Gavieres v. United States, supra; Ex*

parte Nielsen, supra; Giles v. United States, supra, Under *Green* and *Price* the State may not insist that in order to appeal his conviction of the misdemeanor, Perry "must surrender his valid defense of former jeopardy not only on that offense but also on a different offense [the encompassing felony degree of the same crime] for which he was not convicted and which was not involved in his appeal." *Green v. United States,* 355 U.S. 184, 193 (1957).

It may be suggested, by way of objection to the above analysis, that in *Green* and *Price,* the first jury could be seen as having *by implication acquitted the defendant* of the first degree murder charge. Under the "implied acquittal" theory, the jury, having two degrees of an offense before it, and having convicted the defendant of the lesser degree while rendering no verdict on the greater degree, is deemed to have rendered an implied acquittal on the greater degree. This "acquittal" then precludes a subsequent prosecution for the greater offense upon retrial for the lesser offense of which the accused was convicted and from which he successfully appealed. In Perry's case no such inference of implied acquittal can be drawn since the first Court did not have before it (and, indeed, did not have jurisdiction to consider) the greater felony offense.

This objection is not convincing, for the Court in *Green* did not in fact rest its conclusion upon a theory of implied acquittal. The opinion of the Court clearly stated that "the result in this case need not rest alone on the assumption . . . that the jury for one reason or another acquitted Green of murder in the first degree." 355 U.S. at 191. The Court did mention in its opinion the fact that the jury "was given full opportunity to return a verdict of first degree murder and no extraordinary circumstances

prevented it from doing so," *Id.*, a fact, of course, not present in this case. What is present, however, was a full opportunity on the part of the State to bring the greater felony charge against Perry in one original proceeding–an opportunity of which the State did not avail itself, in spite of the fact that "no extraordinary circumstances" prevented it from doing so.[8] *Green* and *Price*, moreover, are similar to this case in that in each case the accused, following his first conviction, could not have been prosecuted for the greater offense–*unless he sought to exercise his right to appeal.*

It is this last common fact that highlights the major theme of *Green*, a theme that has been further developed in later cases and through the separate opinion of individual Justices and which applies with equal force to Perry's situation as it did to *Green*: the theme of the Court's concern with protecting the right of appeal in criminal cases. By forcing defendant to yield his valid double jeopardy barrier to conviction for a greater offense, as a condition of appealing his conviction on the lesser charge, the Government places the defendant in an "incredible dilemma." *Green v. United States*, 355 U.S. at 193. This theme was adopted by Judge (now Justice)

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[8]Contrast, *Illinois v. Sommerville*, 410 U.S. 458 (1973), wherein no double jeopardy violation occurred where a mistrial was declared after uncurable error in the indictment was discovered. The declaration of a mistrial was held required by "manifest necessity" and the "cause of public justice." Here the State deliberately chose to amend the warrant at the District Court level to charge a misdemeanor. Only after Perry appealed the misdemeanor conviction did the State seek to reassert its right to proceed on the felony charge.

Marshall in writing for the Court of Appeals in *Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965). Judge Marshall rejected the "fiction" of implied acquittal and emphasized instead the "unconscionable premium [placed] upon a successful appeal" by a rule that allowed reprosecution upon a greater offense after a successful post conviction attack on the lesser conviction. Others have found the same concern in *Green*. It teaches, wrote Mr. Justice Fortas, that:

> The Government, in its role as prosecutor, may not attach to the exercise of the right of appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge.

United States v. Ewell, 383 U.S. 116, 128 (1966) (dissenting opinion). In view of this purpose of Green, Justice Fortas concluded that "the Government may not, following vacation of a conviction, reindict a defendant for additional offenses arising out of the same transaction *but not charged in the original indictment.*" 383 U.S. at 127. (emphasis supplied). And see the dissenting opinion of Justice Fortas, joined by Justice Douglas and Chief Justice Warren in *Chihos v. Indiana, cert. dismissed as improvidently granted*, 385 U.S. 76 (1966).

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), Mr. Justice Harlan, Mr. Justice Douglas and Mr. Justice Marshall were of the opinion that the double jeopardy clause absolutely barred the State from imposing after retrial a harsher punishment than imposed at the first proceeding. Justice Harlan took note of the theory that greater punishment is prohibited at retrial because the first proceeding had by implication acquitted the defendant of a harsher sentence. He found, however, that more significant than this "fiction" was the fact that if a different construction were placed upon the double

jeopardy clause a defendant's decision whether or not to appeal "would be burdened by the consideration that success followed by retrial and reconviction, might place him in a far worse position. . . ." than he would be in had he not appealed. 395 U.S. 711, 746.[9]

It is clear that at this point the due process concerns of the *Pearce* majority and the double jeopardy arguments based on *Green* and later opinions begin to converge. They meet, and both apply, to the factual situation presented by Perry. Here the defendant, upon conviction of the lesser offense, had a clear double jeopardy bar to a second prosecution for either the same or a greater offense arising out of the same transaction. The fact that a defendant who successfully appeals his conviction yields his bar to reprosecution on the same charge *of which he already stands convicted* does not, of course, inhibit his exercise of post conviction remedies. To subject the successfully appealing defendant to prosecution on a *greater* charge, however, requires him to make a substantial sacrifice in order to appeal, a sacrifice which neither the due process or double jeopardy clauses permit the State to require. This principle was established in *Green*:

> Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on

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[9] A majority of the Court did not adopt the suggestion made by Justices Harlan, Douglas and Marshall that the double jeopardy clause bars enhanced *sentencing* as well as prosecution on a greater charge after the reversal of a conviction on a lesser charge. Their failure to do so, however, does not detract in the least from the argument made here, where a *greater offense* was charged at the de novo trial.

> another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy. 355 U.S. at 193-194, *quoted with approval in Benton v. Maryland, supra*, 395 U.S. at 796.

This principle applies with equal force here. The State sought to place as a condition to Perry obtaining a de novo review of his misdemeanor conviction and six month prison sentence the forfeiture of his double jeopardy bar to prosecution on the greater felony offense. Such a requirement is in plain conflict with the double jeopardy clause, now fully applicable to the States by virtue of the Court's decision in *Benton v. Maryland.*

Only one possible contention by the State remains to be examined. Prior to the decision in *Benton* applying federal double jeopardy standards to the States, North Carolina adopted the position that:

> [C]onviction of a minor offense in an inferior court does not bar a subsequent prosecution for a higher crime embracing the former, where the inferior court did not have jurisdiction of the higher crime. *State v. Birckhead,* 256 N.C. 494, 498, 124 S.D.2d 838, 842 (1962).

The assumption of the North Carolina law—that no jeopardy attached on a charge over which the first court lacked jurisdiction—was condemned as unprincipled as early as 1935 by the American Law Institute.

> There is also a class of cases which hold that a conviction or acquittal in a court of inferior jurisdiction is not a bar to a prosecution in a higher court for a greater crime, which includes the lesser, where the inferior court has no jurisdiction over the greater offense. If it is possible on a prosecution for the greater offense to have a conviction for the lesser offense, of which there has already been an

acquittal or conviction,[10] it would seem that these decisions are untenable in principle. ALI Administration of the Criminal Law, *Double Jeopardy*, p. 137 (official Draft 1935).

A rule allowing a subsequent prosecution for the greater offense following conviction for a lesser included offense in a court of limited jurisdiction is untenable. The fact that the first court's jurisdiction was limited bears no relation to the policies underlying the federal double jeopardy bar to subsequent prosecution. One of those policies is to prevent harrassment of the accused by the State through repeated prosecutions involving the same offense. The State is thus required to bring all its greater or lesser included charges arising out of one criminal transaction in one prosecution.[11] This rule serves the additional function of preventing the State from holding back on a charge of a greater degree of an offense in the hope that the possibility of a prosecution on the greater charge will inhibit the exercise of post conviction remedies by the accused. From the defendant's standpoint, the fact that the first court had jurisdiction to try

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[10]See note 3 *supra*.

[11]The District Court posed the issue in terms of an election:

> The State had, in effect, a choice in these matters. It may try the defendant for a misdemeanor in the District Court, or it may try a defendant for a felony in the Superior Court. But it may not try a defendant for both offenses arising out of the same incident, in two separate courts. Once there has been an election to try on one offense as opposed to the other, that election is binding.

___ F.Supp. at ___ (E.D. N.C. 1972). (See Petition For Writ of Certiorari, p. 18).

only the lesser degree makes absolutely no difference: the ordeal of a second prosecution for a higher crime and the inhibition on seeking appellate review are the same.

To allow the limited jurisdiction of the first court to serve as an excuse for avoiding the mandate of federal double jeopardy requirements could ultimately serve seriously to undemine the Constitutional guarantees against being twice put in jeopardy. Acceptance of the prosecution tactics in this case would allow a state, by the proliferation of courts with limited jurisdiction, to emasculate the protections of the double jeopardy clause. A state, for example, would be free to establish four levels of court, each with limited jurisdiction, to hear varying degrees of charges of homicide. Court 1 would have jurisdiction only over attempted murder: a conviction on that charge in Court 1 would not bar a subsequent prosecution in Court 2 for manslaughter. If the prosecutor were not satisfied with the penalty given the accused upon conviction for manslaughter, he could then bring an action in Court 3 for second degree murder, a crime over which Court 2 had no jurisdiction. The double jeopardy clause under this system, would provide no protection against the second degree murder prosecution since a conviction of one offense in an inferior court "does not bar a subsequent prosecution for a higher offense embracing the former, where the inferior Court did not have jurisdiction of the higher crime." *State v. Birckhead, supra.* By the time three convictions had been rendered and the State was proceeding to try the accused for the first degree murder of the same victim, in Court 4 (the only court with jurisdiction over the most serious degree), it is likely that the implications of *Green v. United States* and *Price v. Georgia* would become clear.

The trial de novo of Perry on felony charges following his appeal from a conviction of a misdemeanor arising out

the same conduct violated his constitutional rights of not being placed twice in jeopardy.

II.

THE ENHANCEMENT OF AN ASSAULT CHARGE FROM A MISDEMEANOR TO A FELONY AT A DE NOVO TRIAL AND THE RESTRICTION OF THE RIGHT TO TRIAL BY JURY DENIED PERRY DUE PROCESS OF LAW.

A. The Enhancement of the Charges Against Perry From the Misdemeanor to Felony Level Upon Appeal for Trial De Novo Violated Due Process of Law.

Following the conviction of Perry on the misdemeanor of assault with a deadly weapon in the District Court and the giving of notice of appeal to the Superior Court for trial de novo, the prosecutorial authorities intervened and secured a bill of indictment against Perry charging a felony for the same conduct for which the prosecutors had originally determined to proceed with a misdemeanor charge.

In *Pearce v. North Carolina, supra,* this Court held that Courts were "without right to . . . put a price on appeals. A defendant's exercise of a right to appeal must be free and unfettered. . . ." 395 U.S. at 724. The Court stated:

> Due process of law . . . requires that vindictiveness against a defendant for having sucessfully attacked his first conviction must play no part in the sentence he received after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of appre-

hension of such a retaliatory motivation on the part of the sentencing judge.

395 U.S. at 725.

In like fashion, a defendant seeking a trial de novo is entitled to assurances that the prosecutor who in the first instance charged him with a misdemeanor cannot punish the taking of an appeal by elevating the pending charge to the felony level. There can be no question that "apprehension of . . . retaliatory motivation", *Id.*, must certainly accompany any claim on the part of the prosecutors of the power to enhance charges if an appeal should be taken.

There can also be no question that the power to enhance the pending charges in the hands of the prosecutor is far greater threat to liberty than the power of a judge to increase sentence. A prosecutor, unlike a judge, is a partisan. Though the canons of ethics speak of the duty of the prosecutor to seek justice rather than conviction, it is a fiction to imagine a prosecutor in a role other than that of advocate.

Second, it is hard to conceive any motive that a prosecutor might have other than punitive for the increasing charges following an appeal. The prosecutor is free in the first instance to place charges at the felony or misdemeanor level. If certain conduct mandates criminal charges at the felony level there is no plausible reason why those charged with that determination are unable to make it in the first instance. The conclusion is inescapable that what happened to Perry could have occurred because Perry sought to exercise his right to a constitutional trial in the Superior Court.

Colten v. Kentucky, 407 U.S. 104 (1972), provides no comfort to the State. In holding that increased punishment following trial de novo did not violate the standard

of *Pearce* or due process of law, the Court reaffirmed the doctrine that vindictiveness can play no role in the sentencing of a defendant who has exercised a right of appeal. Rather the Court asserted its feeling that the two-tier system of Kentucky did not possess the inherent potential for punitive sentencing found in *Pearce*. 407 U.S. at 116. The Court found no reason to suspect that defendant would be detered from seeking a second trial out of judicial vindictiveness. *Id.*

It should require little argument to assert that defendants having been convicted of misdemeanors, will hesitate to seek their absolute right to a second trial if they come to realize that they face a potential penalty of having the charges enhanced to the felony level. Certainly if Perry had *not* appealed and had accepted the judgment of the District Court, the prosecutor could not consistent with due process and double jeopardy have filed felony charges in the Superior Court. *Gavieres v. United States, supra.* In like fashion, the prosecutor could not, consistent with due process, charge Perry with felonious assault following his conviction for misdemeanor assault merely because of the exercise of the right of appeal. *North Carolina v. Pearce, supra.*

B. The Restriction of Perry's Constitutional Right to Trial by Jury Denied Him Due Process of Law.

Perry was originally charged with a misdemeanor offense that carried a maximum imprisonment of two years, N.C.G.S. 14-33 (b)(l) and (c) (1969). Thus, being charged with an offense punishable by more than one year in prison, Perry had an absolute right to trial by jury. *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968). He was clearly denied

that right in that he was compelled to submit to trial in District Court upon his plea of not guilty without the right to have his guilt or innocence determined by a jury. Trial by jury is not provided in District Court, N.C.G.S. 7A-196(b), and a defendant must submit to the jurisdiction of the District Court for the trial of a misdemeanor in the first instance. N.C.G.S. 7A-272. *A fortiori*, the discharge of Perry should be affirmed on this basis alone.

The State may contend that Perry was not utterly denied any access to trial by jury by suggesting that although he was indeed placed in jeopardy of punishment exceeding a year in prison in a proceeding denying that right, he remained free *thereafter* to seek trial de novo with the benefit of jury trial. The contention, however, must fail for two reasons. First, there is simply no authority whatever for the curious view that the right to trial by jury may be postponed until after jeopardy has attached, trial has proceeded through verdict, and sentence has been imposed.[12] So to disparage a constitutional right is wholly inconsistent with the function of its explicit guarantee. So to sanction its postponements is to hypothecate the Bill of Rights, to hobble the accused and to subject him to the ordeal of preliminary trial in the harrassment of which he is powerless to avoid. It is, with all respects, an Alice in Wonderland world in which the

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[12]In *Colten* no constitutional right to trial by jury existed in that the maximum permissible punishment did not exceed the minimal limits of *Baldwin v. New York, supra*. See Ky. Rev. Stat. §437-.016(2) (Supp. 1968). ("Disorderly conduct is punishable by imprisonment in jail for not more than six months, by a fine of not more than $500.00, or both.") In addition, Colton, by consent, was tried before the Court at his trial de novo. 407 U.S. at 108.

State, as the Queen of Hearts, declares: "Sentence first, trial by jury later!"

The recent decision of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) supports this analysis. In *Ward*, the Court, in holding that a defendant was entitled to a trial before a disinterested and impartial judicial officer, rejected the argument that an unconstitutional trial can be corrected by a later de novo trial that conforms with due process.

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in this County Court of Criminal Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be disminished by the possibility of reversal on appeal. Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. at 61-62. The holding of *Ward* is clear: A constitutional right cannot be deferred on a theory that it will be available at a subsequent de novo proceeding.

Second, the contention must fail in any case because of the price which the State attaches to the defendant's postponed right to trial by jury—the price that he must subject himself to the risk of an unexplained harsher charge and harsher sentence should he now elect to exercise that right:

> The inevitable effect of any such provision is, of course, . . . to deter exercise of the Sixth Amendment right to demand a jury trial.

United States v. Jackson, 390 U.S. 570, 581 (1968). It is of no moment that the placing upon the right to jury trial may not be the purpose of the State's scheme. It is enough that the price is there, and that the defendant is made to pay it. *United States v. Jackson, supra.*

Nor is there any similarity between Perry's predicament in this case and the Court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970), with respect to guilty plea bargaining. The lack of similarity arises from the fact that here there is no bargain. Had Perry entered a plea of guilty in the District Court, upon advice of counsel and due record made so to assure adequate review of the voluntariness of his plea entered pursuant to an understanding that he was foreclosing jury trial in exchange for the hope of leniency, *Alford* would of course be on point. But Perry made no such plea, he entertained no such design, he stood upon his claim of innocence to the misdemeanor charge as he had every right to do, and nonetheless he was subjected to trial without jury. Again, had Perry a right of election, either to submit himself to the District Court without jury but with hope of more lenient treatment than he might anticipate by electing trial by jury in Superior Court, or to submit to trial by jury in Superior Court, *Alford* might be relevant. He did not have any such choice, however, for the law of North Carolina gave him none. *Alford* is therefore wholly inappropriate, and the decision is clearly controlled by *United States v. Jackson*.

Because Perry was deprived of the right to trial by jury, and because even the postponed opportunity for jury trial was overlaid by an intimidating price, the decision in the court below must be affirmed.

III.

RESPONDENT IS ENTITLED TO RAISE HIS CLAIMS OF DOUBLE JEOPARDY AND DENIAL OF DUE PROCESS NOTWITHSTANDING HIS PLEA OF GUILTY.

Jimmy Seth Perry appealed his misdemeanor conviction because his six month sentence was made consecutive to a sentence under service. (See App. iii). Much to his consternation he found the price of this appeal to be an indictment charging a felony with a maximum imprisonment of ten years. He was totally unaware of any constitutional implications in the felony indictment. Thus, to Perry the fact of felony as opposed to a misdemeanor conviction came to be of lesser concern than the limiting of the threat of a much increased period of confinement. As noted *supra*[13] the sentence received by Perry following his plea of guilty to the felony did effectively raise the period of confinement by 17 months and one day and thus increased the sentence received in the lower court by 11 months and one day.

The State of North Carolina urges, apparently not contesting the constitutional claims at issue, that a plea of guilty by Perry invariably "waives" the right to assert this defense in his behalf at a later date. Last term this Court stated a basic test:

> "We . . . reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly

[13]See note 4, *supra*.

> admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*" [v. Richardson, 397 U.S. 759].

Tollet v. Henderson, 411 U.S. 256, 267 (1973).

The test of *Tollett v. Henderson*, while perhaps correct for the facts of that particular litigation, states a rule that must be subject to provisos in other factual settings. This particular case presents the opportunity to fashion three such provisos:

> (1) A guilty plea is subject to later constitutional attack when the constitutional claim goes to the very right of the State to place the defendant on trial on that particular charge *at all*, and/or
>
> (2) A guilty plea must be open to constitutional challenge when the constitutional claim is based on legal precedent arising after the plea of guilty and where said precedent has been accorded full retroactive effect, and/or
>
> (3) A guilty plea is open to a due process challenge where the due process claim is so fundamental as to present a claim which goes to "the very essence of a scheme of ordered liberty."

In the *Brady* trilogy[14] defendants were either asserting that a guilty plea had been induced by the fear of a

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[14] *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

potential death penalty and/or by an admission of guilt that had been illegally obtained. In *Tollett v. Henderson* defendant asserted denial of his constitutional rights by reason of the systematic exclusion of blacks from grand jury service.

What is important to note that in no instance was the claim asserted that defendant could not in fact be tried for the offense charged. Whether the relief sought be declaration of the unconstitutionality of a certain penalty provision, the exclusion of certain incriminating statements from evidence or the composing of a new grand jury to hear the case, implicit was a recognition that defendant could properly be brought before the bar to answer the charges made if only certain collateral matters were corrected. No matter how important be issues of constitutional punishment, admissibility of confessions and composition of grand juries, said issues cannot be raised as a bar to the proceeding itself.

The question raised by the *Brady* trilogy and *Tollett v. Henderson*, while conceivably affecting the determination of guilt or innocence, were not in a legal sense dispositive of the issue. Thus, in each instance the guilty plea could properly be viewed as indeed a forfeiture of the right to present the collateral constitutional claims. The defendant, by his plea having waived his privilege against self-incrimination and having affirmed his guilt, all issues unrelated to the right of the State to place the defendant on trial on the particular charge ceased to be relevant. The fact finding process having been concluded by a plea of guilty, the defendant can properly be held to have forefeited constitutional defenses that must of necessity have proceeded a determination of guilt or innocence.

But contrast the claim of double jeopardy put forth by Perry. The question of guilt or innocence is simply not

the issue. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the protection against double jeopardy is explained:

> That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

395 U.S. at 717. Thus, the admitted guilt of an accused to a criminal charge does not preclude the claim of double jeopardy. *Ex parte Nielsen*, 131 U.S. 176 (1889). The defendant asserts simply that the State does not have the right to make him answer to the particular charge. As such the plea of guilty does not make unnecessary, as it was in the *Brady* trilogy and *Tollett v. Henderson*, the resolution of the constitutional issue.

This distinction was made clear by the First Circuit in *United States v. De Costa*, 435 F. 2d 630 (1st Cir. 1970):

> We have recently held that the right to trial by jury, the right against self-incrimination, and the right to confront one's accusers are impliedly waived by a guilty plea (citation omitted). But these rights are directly related to the substantive matters that would have been presented at trial; whereas the right to a speedy trial has no direct connection to the determination of defendant's guilt or innocence. It would therefore seem to be a useless gesture and a waste of judicial resources to require a defendant to go through the motions of a formal trial in order to preserve his right to appeal the denial of his [speedy trial] motion.

435 F. 2d at 632. Coerced confessions are not reviewable following a plea of guilty, the court said, because the plea is an admission of guilt:

> As such, it is clear waiver of the right against self-incrimination, on which any subsequent attack on a coerced confession would have to be based.

435 F. 2d at 632. *See also United States v. Karger*, 439 F. 2d 1108 (1st Cir. 1970), *cert. den.*, 403 U.S. 919 (1971) (claim of preliminary hearing denial waived by plea of guilty). Thus, there is authority that:

> There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims.

United States ex. rel. Rogers v. Warden, 381 F. 2d 209, 213 (2d Cir. 1967). *See also*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 31-32 (approved draft 1970).

To hold that a defendant must contest all issues of a pending prosecution or surrender totally by a plea of guilty suffers the faults which *De Costa* court diagnosed; it doesn't differentiate between those issues related to the determination of guilt at trial and those not so related. As Professor Parker noted a decade ago, some principles of due process are designed to safeguard "the reliability of [a criminal justice system's] factfinding" and others are "designed to safeguard the integrity of the process" itself. Parker, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 14, 16 (1964). To hold that a plea of guilty automatically surrenders all constitutional claim indis-

criminately lumps together the waiver of both types of principles.[15]

The inevitable results are well known. The defendant who has no desire to contest guilt yet does wish to contest a system-related issue, is torn. He is, on the one hand, encouraged to enter a plea of guilty – his sentence might be reduced; some charges might be dropped; his time and money might be saved. Yet, on the other hand, it might be the case that he ought *not* to be punished *despite his guilt* – he might once have been in jeopardy (even convicted and punished); he might have been given transactional immunity in return for compelled self-incrimination; he might have been awaiting trial for far too long. If a plea of guilty is said to be a blanket surrender of all issues, the inducements which encourage admissions of guilt likewise encourage surrender of system-related issues. *See* Cogan, *Guilty Pleas: Weak Links in the 'Broken Chain.'*, 10 Crim. L. Bull., No. 2 (1974).

This notion is inconsistent with the respect for certain principles that go not to guilt or innocence, but to our conception of a just system. As Professor Cogan observes:

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[15]"[A] line between guilt-related and system-related principles cannot always be clearly drawn; particularly ones drawn from centuries of common law and constitutionalized through a dozen-or-so debates, are not single faceted. Yet it would seem . . . the values which inhere, as example, in the double jeopardy and speedy trial principles cluster more closely near the ideal of a fair system of criminal justice (*qua* system) than near the ideal of an accurate one. The values which inhere in the jury trial, confrontation and cross-examination principles probably cluster conversely." Cogan, *Guilty Pleas: Weak Links in the 'Broken Chain'*, 10 Crim. L. Bull., No. 2 (1974).

> The *Brady* Court held that inducements inherent in a system which permits waiver of the issue of guilt will not render a plea of guilty involuntary. 397 U.S. at 750-753. Yet it would seem that in a contest/surrender model, where those same inducements encourage the waiver of system-related issues, they do so improperly. While it might be in a system's interest to encourage admissions of guilt (for the purpose of rehabilitation, for example), there is no interest—other than sheer efficiency—in tying the acceptance of such admissions hand-in-hand with waiver of system-related rights. Inducements encouraging such waivers are not the "inevitable attribute(s) of any *legitimate* system which tolerates and encourages the negotiation of pleas." *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (emphasis supplied). They are attributes of a system which demands surrender or else. To allow such inducements to operate unchecked in the interest of efficiency alone would seem to unreasonably interfere with the vindication of important rights (e.g. Reece v. Georgia, 350 U.S. 85 (1955)) and render their waiver involuntary. *Id.*

"The fundamental nature of the guarantee against double jeopardy cannot be doubted . . . like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice'." *Benton v. Maryland*, 395 U.S. 784, 795-96. Given the constitutional import of double jeopardy and given the fact the integrity of the plea of guilty is unaffected by the claim of double jeopardy, a plea of guilty, standing by itself, should not be held to preclude a later constitutional claim of double jeopardy.

It is also urged that a defendant should properly be allowed to present a constitutional claim notwithstanding a plea of guilty where said claim is based on legal authority established subsequent to the plea and where

said authority has been accorded full retroactive effect. Perry entered his plea of guilty to the felony on October 29, 1969. At that time the applicable legal authority in North Carolina, *State v. Birckhead, supra,* rejected the double jeopardy claim. 265 N.C. at 497, 124 S.E.2d at 842. See page 17, *supra*. Thus, for possible double jeopardy relief Perry would have needed to examine federal authority.

At the time of his plea of guilty the Supreme Court had held in *Green v. United States, supra,* that a defendant who had been tried for first degree murder and found guilty of the lesser included offense of second degree murder, could not, following a successful appeal, be retried for first degree murder. In *Benton v. Maryland, supra,* the Court held the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment. Though these decisions certainly foretold of Perry's possible double jeopardy claims, not until the later decisions of *Price v. Georgia*, 398 U.S. 323 (June 15, 1970) and the Fourth Circuit decision of *Wood v. Ross*, 434 F.2d 297, 299 (4th Cir.) (November 16, 1970) were the actual contours of the claim clear.

"There can be no doubt of the 'retroactivity' of the Court's decision in *Benton v. Maryland*. In *North Carolina v. Pearce*, 395 U.S. 711 . . . , decided the same day as *Benton*, the Court unaminously accorded full 'retroactive' effect to the *Benton* doctrine." *Ashe v. Swenson*, 397 U.S. 436, 437 n.1. (1970).[16] Thus, if the double jeopardy rules fashioned by this Court and made

[16]See also, *Waller v. Florida*, 397 U.S. 387, 391 n. 2 (1970); *Price v. Georgia, supra,* 397 U.S. at 330 n. 9.

applicable to the State by *Benton* are to be accorded full retroactive protection, it is necessary to permit a constitutional challenge based on *Price v. Georgia, supra* and *Wood v. Ross, supra,* to proceed even in the face of a guilty plea.

In *Brady v. United States, supra,* Mr. Justice White stated for the majority: "(A) voluntary plea of guilty intelligently made in the light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U.S. at 757. The basis for this holding is made clear by the following language in *McMann v. Richardson, supra*:

> The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. . . .
>
> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were valid when made, and be given another choice between admitting their guilt and putting the State to its proof.

397 U.S. at 773.

The distinction in the claims made by Perry are compelling. Whether or what crime Perry committed is simply not at issue. Likewise, this is not an instance where a defendant seeks the right of making a new "choice between admitting (his) guilt and putting the State to its proof." Rather, it is asserted that double jeopardy bars the State from requiring Perry to make the choice.

The foregoing does not mean that a defendant pleading guilty can under no circumstances "waive" his claim of double jeopardy. It is suggested that the Court can rely on its "previous counsel that whether a defendant is to be precluded from establishing a claim that his constitutional rights have been infringed 'must depend, in each case, upon the particular facts and circumstances surrounding that case,' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)." *Tollett v. Henderson, supra,* 411 U.S. at 269 (dissenting opinion). The rule can thus be stated:

> "(C)ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or a privilege.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis supplied). Since North Carolina has a rule that all non-jurisdictional defenses (including a claim of double jeopardy) are waived by a plea of guilty, *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971), the acceptable course is to examine the record to determine if Perry deliberately bypassed review of his claim by pleading guilty. *Fay v. Noia*, 372 U.S. 391, 439 (1963). With respect to the plea of guilty, the parallel test is this—was Perry's plea an intelligent and voluntary waiver of his claim?

The majority in *Tollett v. Henderson* recognized that no waiver occurs where the constitutional claim is unknown both to defendant and his attorney. 411 U.S. at 266. Nothing in the record of this case or in the State of the law at the time of the guilty plea raises an inference that Perry and his counsel made a deliberate and knowing choice to waive a claim of double jeopardy. Waiver is not

to be presumed from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 242-244, (1969); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

It is proper to ask what effect permitting a constitutional claim of double jeopardy subsequent to a guilty plea could mean to efforts to secure some sort of finality in criminal litigation. The claim of double jeopardy does not generally require extensive court time in terms of evidentiary hearings. The merit or lack thereof of such a claim is generally apparent on the face of the record. Second, it is urged that courts should have no hesitation to strike aside judgments based on charges for which a defendant could not properly be placed in jeopardy. The legitimate goal of judicial economy is not enhanced by affirming proceedings wherein the State has imprisoned persons who could not properly have been tried on the charge on which they stand convicted.

Finally, it is urged that if for no other reason, the facts of this particular case make a strong due process claim for permitting a claim of double jeopardy without regard for the plea of guilty. To permit a prosecutorial authority to enhance criminal charges from the misdemeanor to felony level as a penalty for exercising a statutory right to seek trial de novo it is submitted is "a hardship so acute and shocking that our polity will not endure it."[17] *Palko v. Connecticut*, 302 U.S. 319, 328 (1937). *See also Chambers v. Mississippi*, 410 U.S. 284 (1973). As stated in *North Carolina v. Pearce, supra*:

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[17]It is significant that a defendant charged with a misdemeanor can secure a jury trial under North Carolina law *only* by appealing the conviction in the district court to the Superior Court for trial de novo. N.C.G.S. 7A-196(b). See Section II B of the Argument, *supra*.

> A court is "without right to .... put a price on an appeal. A defendant's exercise of right of appeal must be free and unfettered . . . (I)t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."

395 U.S. at 724. If due process dictates that vindictiveness can play no part in a decision by a court regarding sentence following a new trial after a successful appeal, then surely a prosecutor is not free consistent with due process to penalize the exercise of appeal rights by enhancing the charges which the defendant must face. In an instance where the constitutional claim is bolstered by an independent due process claim, respect for the integrity of our judicial system should set aside any argument that a plea of guilty has closed off judicial scrutiny of prosecutorial action which if allowed to stand would threaten "the very essence of a scheme of ordered liberty." *Palko v. Connecticut, supra,* 302 U.S. at 325. To paraphrase Mr. Justice Brandeis, the guarantee of due process exists "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States,* 272 U.S. 52, 293 (1926) (dissenting opinion).

IV.

BOYKIN V. ALABAMA, 395 U.S. 238, REQUIRES A FULL STATEMENT TO A DEFENDANT OF THE RIGHTS WAIVED BY A PLEA OF GUILTY. FAILURE TO WARN PERRY THAT HIS PLEA OF GUILTY COULD CONSTITUTE WAIVER OF DOUBLE JEOPARDY AND DUE PROCESS CLAIMS REQUIRES A DETERMINATION OF THE MERITS OF THESE ISSUES.

This court has made clear by the *Brady* trilogy and *Tollett v. Henderson*, that a plea of guilty, being an

admission of the validity of the pending charge, is a grave and solemn act not lightly to be disregarded and set aside. In the process of insulating guilty pleas from later attack based on allegations of constitutional issues, the Court has likewise seen fit to assure that the guilty plea is accepted with a full understanding by a defendant of the full consequences of his act.

Thus, in *Brady v. United States, supra,* it is stated:

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done without sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. at 748; see also, *McMann v. Richardson, supra,* 397 U.S. at 766.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the requirements for acceptance of a guilty plea were made specific. *Boykin* established the proposition that "it (is) error . . . for the trial judge to accept (a) guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242. The Court held:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury . . . Third, is the right to confront one's accusers. . . We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243. See also *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Several state appellate courts have held that *Boykin* at a minimum means that each of the three enumerated

rights—self incrimination, confrontation, and jury trial—must be specifically and expressly set forth for the benefit of and waived by the accused prior to acceptance of his guilty plea. *In re Tahl*, 1 Cal.3rd 122, 460 P.2d 499 (1969) *cert. den.*, 398 U.S. 911; *Bishop v. Langlois*, 106 R.I. 56, 256 A.2d 20 (1969); *McBain v. Maxwell*, 2 Wash. App. 27, 466 P.2d 177 (1970). The explicit rationale of these authorities is that mere inference of waiver is no longer sufficient; that the rights waived must be enumerated and responses elicited from the person of the defendant. But, cf. *Wade v. Coiner*, 468 F.2d 1059 (4th Cir. 1972).

Given the grave consequences of a plea of guilty, *Tollett v. Henderson, supra,* and the requirement of an explicit record showing a waiver of constitutional rights in cases where a guilty plea is entered, *Boykin v. Alabama, supra,* no inference should be allowed that Perry has "waived" his constitutional protection against double jeopardy. The record in this case discloses that Perry was asked a series of form questions; that he did acknowledge his right to trial by jury and did declare that his constitutional rights had not been violated. But with the possible exception of the right to trial by jury, there is no acknowledgement of the nature of the constitutional rights at issue, and more importantly, no indication of an awareness that the guilty plea amounts to a surrender of these rights.

In *Tollett v. Henderson, supra,* it is noted:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry.

411 U.S. at 267.

The language is inappropriate wherein a constitutional claim that goes to the heart of the right of the state to place the defendant in jeopardy is presented. To permit a defendant, unaware of his double jeopardy or due process claim, to be bound by the form of a guilty plea as opposed to the substance of his constitutional claim is to exalt in this instance the procedural over the substantive.

The issue simply stated is: Can the State of North Carolina imprison Perry on a criminal charge for which the State had no right to place him in jeopardy simply because of the entry of a guilty plea where the double jeopardy claim is not even known to the defendant? For a waiver of constitutional claims by reason of a guilty plea to be valid under the due process clause, it "must be 'an intentional relinquishment or abandonment of a known right or privilege'." *McCarthy v. United States, supra*, 394 U.S. at 466.

Perry, neither having relinquished or waived either his double jeopardy or due process claim by reason of any knowing or intelligent act, must be permitted to have the claim litigated on its merits.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Attorney for Respondent

APPENDIX

General Court of Justice
6th Judicial District
CLERK SUPERIOR COURT
NORTHAMPTON COUNTY
JACKSON, NORTH CAROLINA
December 17, 1973

R. J. WHITE, JR., Clerk,
Ex Officio Judge of Probate

BERT M. MONTAGUE, Director
Administrative Office of the Courts
PERRY MARTIN
Resident Judge

Mr. Jim Keenan
Attorney at Law
P. O. Box 1003
Durham, North Carolina 27702

Re: State v. Jimmy Perry
69-Cr-2135

Dear Mr. Keenan:

When the above-named case was heard in the Northampton County District Court at the August 20, 1969, session, the defendant was originally charged in the warrant with misdemeanor assault with deadly weapon. Mr. Russell H. Johnson, Jr., was appointed to represent him. At that time, Mr. W.E. Murphrey, III, Assistant Solicitor, moved to amend the warrant to charge felonious assault and the motion was allowed. However, it was amended again to charge misdemeanor assault and was found by the Court to be guilty. My records do not indicate that any sentence at this time was finally imposed, but they do indicate that the defendant gave notice of appeal and, at that time, the Court found

probable cause and the case was bound over to Superior Court.

I am enclosing certified copies of excerpts from the minutes of this session of court in respect to this particular case. I am also enclosing copy of page taken from the Judge's calendar which are not a part of the minutes but it does indicate that there was some controversy involved.

If I can be of further assistance, please advise.

Sincerely,

/s/ Miriam W. Pruden
Miriam W. Pruden
Assistant Clerk

Enclosures (6)